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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 487

CANADA MALTING COMPANY, LTD.,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
[redacted] 488 *Respondent.*

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
[redacted] 489 *Respondent.*

HENRY K. STARNES, doing business as
H. K. STARNES & COMPANY,
Petitioner-Libelant,
against
PATERSON STEAMSHIPS, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO AN APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI.

Facts.

The undisputed facts, upon which the District Court exercised its discretion and declined jurisdiction are:

(1) Each of the libelants, as well as the respondent, are citizens and residents of Canada. (R. 4, 61, 70.)

(2) Both vessels involved in the collision are of Canadian registry and ownership. (R. 17, 24, 82, 83, 89.)

(3) The officers and members of the crews of both vessels were Canadian citizens and residents (R. 18, 25, 84, 90), and are not subject to compulsory attendance as witnesses in the District Court. (R. 43, 107.)

(4) The contracts of affreightment for the carriage of the cargo, later damaged as a result of the collision, were made in Canada. (R. 18, 25, 83, 90.)

(5) The cargo, later damaged as a result of the collision, was laden at a Canadian Port (Port Arthur), and was destined for another Canadian Port (Montreal). (R. 4, 61, 70.)

(6) The Dominion Wreck Commissioner had determined that the masters of both vessels were at fault for the collision. (R. 51-60.)

(7) Action was pending in the Canadian Admiralty Court, there instituted by this respondent, for the judicial

determination of liability as between the colliding vessels. (R. 21, 34, 86, 98.)

In determining to decline jurisdiction, the District Court based its decision upon these undisputed facts, and also upon the provisions of the Root-Bryce Treaty of 1909 and the decisions of this Court. (R. 132-138, 141-144.) The District Court also found that no failure of justice would result by refusing jurisdiction and relegating the parties to the Courts of their citizenship, saying "That the rule in this Court is more favorable to cargo owners is insufficient reason for retaining jurisdiction." (R. 135.)

The Circuit Court of Appeals, in affirming the decision of the District Court (opinion reported at 51 Fed. (2d) 1007), held that by virtue of the Root-Bryce Treaty, as well as the decisions of this Court, the waters of Lake Superior are international boundary waters occupying, by virtue of the Root-Bryce and preceding treaties, the status of high seas, and that the law of the flag of the colliding vessels (*i. e.*, the Canadian Law) must be applied; and that the District Court had discretion to decline jurisdiction, which discretion had been exercised without abuse. The decrees of the District Court dismissing the libels and remitting the libelants to their remedies in the Courts of the Dominion of Canada were, therefore, affirmed. (R. 177-182.)

I.

The decision of the Circuit Court of Appeals that the law of the flag must be applied was correct.

In contending that the decision of the Circuit Court of Appeals is wrong, the petitioners first set up the proposition that since the collision occurred within the territorial

waters of the United States, the law of the place must be applied, and the rights of the parties determined according to the law of the place, *i. e.*, the law of this country.

In support of this proposition petitioners cite several decisions of this Court, all of which, with a single exception (*i. e.*, Smith v. Condry, 1 How. 28), assert the application of the doctrine of *lex loci delicti* solely with respect to civil liability for a tort arising either at common law or because of statutory provision. That the principle therein asserted has no application whatever to the case of a maritime tort, such as collision, is sufficiently plain without argument, since a maritime tort such as collision gives rise to a *jus in re*, a right or privilege which is enforcible wherever the offending ship may be found. The China (The China v. Walsh), 74 U. S. 53, 68; The John G. Stevens, 170 U. S. 113, 122, 123; and cases cited.

Nor does the decision in the case of Smith v. Condry furnish authority for the proposition asserted by petitioners, since that case was later considered and definitely rejected by this Court in the case of The Eagle, 75 U. S. 15, where it was urged as authority upon the identical proposition, viz., that the admiralty lien for collision occurring between two American vessels in the Canadian waters of the Detroit River must depend upon the law of the place where the alleged right occurred. The assertion of Smith v. Condry as a controlling authority was similarly denied by the Circuit Court for the Northern District of Ohio in the case of The Avon, Fed. Cases No. 680, where the Court held that an American vessel was entitled to recover against a Canadian ship for damages arising out of a collision on the Welland Canal.

It is clear that since the source of the maritime lien or privilege arising from the collision is in the general maritime law itself, the extent of such lien or privilege rests entirely upon the maritime law and is not at all dependent upon or measured by the *lex loci delicti*, as though occurring upon the land.

This principle received the recognition of this Court in the case of The Eagle, *supra*, where it was held that the circumstance that two American vessels collided in Canadian waters on the Detroit River constituted no objection to the exercise by our District Courts of the grant of admiralty and maritime jurisdiction given by the Judiciary Act of 1789, and that the cause was properly determined according to the practice and principles of our Courts of Admiralty, *irrespective of any local law.* (Italics ours.)

Similarly in the case of The New York, 175 U. S. 187, where collision between two American ships occurred concededly in waters upon the Canadian side of the Detroit River, the Federal courts assumed and retained jurisdiction to final disposition, applying our maritime law. In the case of The Avon, *supra*, our District and Circuit Courts assumed and retained jurisdiction over a Canadian vessel for damage received by an American ship by reason of a collision occurring in the Welland Canal, which is wholly within the territorial limits of the Dominion of Canada, it being there determined that the maritime law affords the measure of right and does not yield to the local law. In U. S. v. Rodgers, 150 U. S. 247, this Court in upholding the jurisdiction of our Courts with respect to an assault committed on board an American vessel while traversing waters upon the Canadian side of the Detroit River, held those waters, from shore to shore, to be within the admiralty and maritime jurisdiction of the United States.

See also:

Thompson Towing & Wrecking Ass'n v. McGregor, 207 Fed. 209.

The adoption of the proposition advanced by petitioners would mean the reversal by this Court of the cases of The Eagle, *supra;* The New York, *supra;* U. S. v. Rodgers, *supra;* and of the principle set forth in The Avon, *supra,* because in all those cases the tort arose in waters within the territorial limits of the Dominion of Canada, and upon the Canadian side of the international boundary extending through the Great Lakes.

It follows that if the cases of The Eagle, *supra;* The New York, *supra;* and The Avon, *supra,* were rightly decided, then in any case where two Canadian ships, navigating the Great Lakes, collide upon the American side of the international boundary line, jurisdiction of such collision is properly in the Courts of the Dominion of Canada, where the respective rights of the parties will be determined according to the law of their common flag. It results that no possible prejudice can result to petitioners from the relegation of their claims by our Courts to their home forum.

Further, the proposition advanced by petitioners is not in consonance with the provisions of the Root-Bryce Treaty of 1909, 36 Stat. 2448. That treaty, by its definition of boundary waters and by the provisions of Article I thereof, made *all the waters from main shore to main shore* of the Great Lakes and their connecting waterways forever free and open for the purposes of navigation and commerce to the inhabitants and ships of both countries *equally.* (Italics ours.) It results that the rights of navigation and commerce therein reciprocally stipulated extend to the full

limit of the boundary waters, wholly irrespective of the location of the international boundary line as geographically laid down between the two countries. Article I in express terms vests in the owners of Canadian ships navigating such boundary waters the right to have any controversy arising through such navigation determined by the law of their own country. This follows since the local laws and regulations therein referred to must not be inconsistent with such privilege of free navigation and must apply equally and without discrimination of the inhabitants and ships of both countries. No such inconsistency may be permitted, therefore, with respect to the rights and obligations which arise as an incident to such freedom of navigation and commerce.

The entire scope of the Root-Bryce Treaty, creating, as it did, new international law with respect to the use, flow and diversion of the boundary waters separating the two countries, is in opposition, and contrary to the proposition advanced by petitioners.

With reference to the opinion of the Secretary of State cited in support of petitioners' contention, the same related entirely to the question of the taking of property from either side of the international boundary line, as the case might be, and as relating to such property right, was no doubt, then rightly rendered. In any event, in the letter cited, specific reference is made to the common right of navigation and transit upon the waters of the Great Lakes, and the opinion rests solely upon the question of fishing rights affecting those waters. However, in view of the later provisions of the Treaty of 1908 concerning such fisheries, and providing for international regulations therefor to be made by an international commission appointed for the purpose, the opinion referred to has no present force.

Further, the proposition advanced by petitioners, if sound, must apply alike under all circumstances. If, therefore, the instant causes had been instituted before the Admiralty Courts of the Dominion of Canada, would petitioners be able to there successfully maintain that the law of the United States, as being the law of the place, must apply? Obviously not, since that forum would necessarily and properly apply the Canadian Law, which determines the extent of the obligation of each colliding vessel sailing under its flag. See The Eagle Point, 142 Fed. 453, Cert. denied, 201 U. S. 644.

Since the maritime law affords the measure of right applicable here, rather than the local law, the Circuit Court of Appeals was entirely correct in applying the rule set forth in The Scotland, 105 U. S. 24, 29, 30, upon the ground that the collision occurring upon the waters of the Great Lakes was to be dealt with as though happening upon the high seas, and that the law of the flag must be applied. If the uniform characteristic of the maritime law is to be preserved, as this Court has more than once declared, the decision of the Circuit Court of Appeals must be upheld. Any other conclusion would inevitably lead to great confusion in every collision case arising upon the Great Lakes and their connecting channels, and would result in a necessary determination as to the place and point of collision as an original question of fact before it would be possible to determine whether the law of the United States or that of Canada would be applied thereto. Certainly such a result does not commend itself to sound reason.

II.

Retention of jurisdiction by the District Courts in admiralty causes pending between foreigners is a matter of privilege and not of right.

Petitioners contend secondly that the District Court had no discretion to decline jurisdiction in these Admiralty Causes even though the parties are not citizens of the United States.

In urging this proposition petitioners cite various authorities. None of these authorities, however, furnishes support for the claim that a District Court, sitting in Admiralty must retain jurisdiction of a suit brought by one foreigner against another foreigner.

The Second Employers' Liability cases cited by petitioners (223 U. S. 1) had to do with the obligation of State Courts to enforce remedies created by Federal Statutes. The question of the rights or privileges of foreigners was not involved. It was held that the several states being part of the Federal Government are bound both by law and the Constitution of the United States to enforce such remedies. Note the reasoning of the Court at page 57, where the decision in Claflin v. Houseman, 93 U. S. 130, 136, is quoted extensively.

Examination of the opinion of the Court in Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, shows that the language cited by petitioners was employed by Chief Justice Marshall in connection with the holding at page 405 that the Court's jurisdiction was not arrested by the circumstance that a state was a party.

In the case of Chicot County v. Sherwood, 148 U. S. 529, it was determined that the jurisdiction of the Courts of the United States over controversies between citizens of different states could not be impaired by state laws regulating the modes of redress against counties in the State.

Without specifically referring to the remaining citations urged in support of petitioners' contention, it is to be observed that none of them deal with the question of admiralty and maritime jurisdiction or with aliens as parties in admiralty cases.

With reference to the grant of admiralty and maritime jurisdiction contained in Section 41 of the United States Code, there is, of course, no question but that the subject matter of the action, together with acquisition of control by the Court over the property or person, irrespective of the nature of ownership or of citizenship, is sufficient to confer jurisdiction upon a District Court of the United States sitting in admiralty.

However, the contention of petitioners that having once acquired jurisdiction, the District Court was bound to retain such jurisdiction is not borne out by the authorities. It has been the holding of this Court in several cases, and of the lower Federal Courts as well, that the retention of jurisdiction in a suit in admiralty where all the parties are foreigners is not an absolute right, but a privilege only, since a Court of Admiralty is under no obligation to retain jurisdiction in such case.

The principle was recently flatly stated by this Court in the case of Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd., 281 U. S. 515, 517, where it was said in an action brought in an American Admiralty Court by one

British corporation against another British corporation for the recovery of a general average deposit made in London:

> "The retention of jurisdiction of a suit in Admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. The Belgenland, 114 U. S. 355; 368; The Maggie Hammond, 9 Wall. 435, 437."

Again, in the case of Langnes v. Green, 282 U. S. 531, 544, this Court again said:

> "Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.' The Maggie Hammond, 9 Wall. 435, 457; The Belgenland, 114 U. S. 355, 368; Charter Shipping Co. v. Bowring, Jones & Tidy, 281 U. S. 515, 517."

In the case of The Maggie Hammond, 9 Wall. 435, at page 457, this Court specifically approved the statement of Mr. Parsons that the question is one of discretion in every case where the subject matter of the controversy is of a maritime nature, and that the Court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum. In the case of The Belgenland, 114 U. S. 355, the general doctrine as set forth in The Maggie Hammond was flatly approved.

It would seem, therefore, that the proposition contended for by petitioners lacks the sanction and authority of this Court, since this Court has clearly again and again stated the principle of discretion in admiralty actions pending between foreigners without any limitation whatsoever.

Our Courts, both State and Federal, were created primarily for the establishment of rights and the redress of wrongs accruing to the citizens of the several States and of the United States.

Neither the statute (Section 41, United States Code), which confers original admiralty and maritime jurisdiction, nor the provisions of the Constitution by virtue of which such statute was enacted, can be construed to give to foreigners a right to demand of our Federal Courts that cognizance be taken of controversies pending between such foreigners. At law, the Federal Courts have no jurisdiction, by virtue of the Constitution and the enabling statute over actions where both parties are foreigners. See Cunard S. S. Co. v. Smith, 255 Fed. 846, and cases cited.

In Admiralty, the retention of jurisdiction in cases where both parties are foreigners is a matter of privilege and not of right. Hence the retention of jurisdiction in such cases has been determined to be a matter of discretion in the District Court. Any other construction would result in an invitation to alien litigants to avail themselves of the American Admiralty Courts whenever some particular litigant thought that the American law or procedure would be more favorable to his case than the law of his home forum.

Such is precisely the case in the instant causes, since the retention of jurisdiction by our Court is here sought solely because these Canadian libelants desire to obtain advantage of the American rule of law which permits recovery of the total cargo loss, sustained by reason of the collision, from this respondent if both vessels were at fault; whereas, under Canadian law, to which the parties are subject and under which the contract of carriage was made and begun, their right of recovery as against respondent, would

be limited to recovery of a moiety of the loss. That a finding of mutual fault may be reasonably anticipated is evidenced by the formal report of the Dominion Wreck Commissioner wherein the Masters of both colliding vessels were found at fault. (R. 51.)

What reason then exists why our Courts should hear controversies between foreigners who have a common forum and law?

III.

The District Court rightly exercised its discretion in declining to retain jurisdiction.

The Circuit Court of Appeals rightly held that they found no abuse of discretion by the District Court in declining to retain jurisdiction and in remitting the parties to their home forum. Petitioners do not attack this finding beyond their insistence upon the absence of any discretion in the District Court to decline jurisdiction.

From the decisions of this Court cited in support of the last point, it is clear that the primary circumstance in the exercise of such discretion is whether under all the circumstances justice would be done as well by remitting the parties to their home forum. Upon the basis of the undisputed facts, all of which were considered by the District Court in reaching its conclusion, it is clear that remitting the petitioners to their home forum could work no injury as every right and obligation accruing to the parties could be there adjudicated under their common law in an action already pending between the parties.

Moreover, the consideration as to the convenience of witnesses was an added consideration with the District Court. Not only are the witnesses in Canada and outside

the jurisdiction of our Court, but they are Canadian subjects and citizens who are not in any manner subject to the control or jurisdiction of our forum. They could not be compelled to come into this country and testify, nor could they be compelled to testify by deposition taken in Canada for use in our forum.

That jurisdiction will be declined in admiralty causes between foreigners where the witnesses are all without the United States and no failure of justice will result, see:

Charter Shipping Co. Ltd. v. Bowring, Jones & Tidy, Ltd., *supra.*

The New Texas, 1926 A. M. C. 1514.

Goldman v. Furness, Withy & Co., 101 Fed. 467.

The Iquitos, 286 Fed. 383.

Such was the finding of the District Court, which should be sustained.

Conclusion.

The District Court rightly exercised its discretion in refusing to retain jurisdiction of the cases and in remitting the parties to their home forum. The Circuit Court of Appeals properly affirmed the determination of the District Court. The petitions for certiorari should, therefore, be denied with costs.

Respectfully submitted,

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